

METRO CHARM SDN BHD

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v.

LEE NYAN HON & BROTHERS SDN BHD & ANOR

HIGH COURT MALAYA, IPOH

B

JAMES FOONG JCA

[CIVIL SUIT NO: 22-76-2001]

21 MAY 2007

LAND LAW: *Tenancy agreement - Whether notice of remedy applicable for unregistered tenancy agreement - Whether tenancy a contingent contract - Whether landlord entitled to evict tenant forcefully and demolish all structures within tenanted property - Section 235 of the National Land Code (NLC)*

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The 2nd defendant was authorised to let a piece of land owned by the 1st defendant, the landlord. Pending formalisation of the written tenancy agreement the piece of land was allowed to be occupied by the plaintiff provided the plaintiff applied to the relevant authorities for the necessary licences to operate an entertainment outlet and erection of structures. As soon as the tenancy agreement was formalised, the plaintiff had secured approval from various authorities including the Majlis Bandaraya Ipoh (MBI) that had imposed preconditions and fees 20 times more than usual against the plaintiff for constructing structures without prior approval from MBI. The plaintiff commenced operating the entertainment outlet of which the 2nd defendant was the director with two other principal shareholders. The 2nd defendant was authorised as the compulsory signatory for all cheques and banking documents. The plaintiff had covenanted to comply with the tenancy agreement *inter alia* to pay rental monthly in advance on the 15th day of each and every succeeding month; to entitle the 1st defendant to repossess the piece of land in accordance to the provisions of s. 7(2) of the Specific Relief Act 1950 (the Act). The plaintiff had issued a cheque being the rental payable to the 1st defendant which was dishonoured when it was tendered, after lapse of more than two weeks, to the plaintiff's bank resulting in a breach of the term of the tenancy agreement to pay within the stipulated time. The plaintiff had twice attempted to pay the rental sum but was rejected by the 1st defendant. The 1st defendant contended that the tenancy was

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- A terminated, sealed and demolished all structures on the piece of land. The plaintiff argued that the tenancy agreement was wrongfully terminated; that pursuant to s. 235 of the National Land Code (NLC) the 1st defendant did not give sufficient notice to the plaintiff to remedy the breach and that the 2nd defendant
- B had breached his fiduciary duty as a director of the plaintiff and sought relief *inter alia* the cost and expenses of reinstatement of the structures to its original state, loss of profit, general damages for wrongful eviction; loss of goodwill of its business. However the 1st defendant contended *inter alia*; that the plaintiff had breached
- C the tenancy agreement by failing to pay the rental within the stipulated time, that the plaintiff failed to comply with the laws imposed by the MBI, that the Act was not applicable as the structures were built without proper building plans from MBI and that the plaintiff's business licences had been revoked.

D **Held:**

- (1) The time taken by the 1st defendant in presenting the plaintiff's cheque for payment was not unreasonable and in accordance to s. 74(b) of the Bills of the Exchange of Act
- E 1949. The plaintiff should have been more vigilant in monitoring its banking account to ensure that there were sufficient funds to meet payment of the cheque. Therefore, failure to pay the rental within the time stipulated in the
- F tenancy agreement had given the defendant a legitimate right to terminate the plaintiff's tenancy. (para 23)
- (2) The requirement to give sufficient notice to remedy the breach of the provisions of the tenancy does not apply as the tenancy agreement had not been registered under the NLC. (para 26)
- G (3) A tenancy agreement is not a contingent contract. The conditions precedents as argued by the 1st defendant are actually covenants and cannot be translated into conditions precedent. As such, if the plaintiff had breached any of the
- H stipulated covenants, the 1st defendant, as landlord, is entitled under the terms of the tenancy agreement to seek remedy against the plaintiff, such as terminating the tenancy agreement. It does not, however, make the tenancy agreement void. (para 33)

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- (4) Section 7(2) and (3) of the Act regulates the remedy for any breach of tenancy agreement and restricts the 1st defendant to enforce its rights to recover its property from the occupier, even after the tenancy had been terminated, by way of a court action. The 1st defendant had failed to adopt this approach but instead enforced its rights by self help and hence the 1st defendant was not entitled to evict the plaintiff forcefully and demolish all structures on the said premises. (para 36) A
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- (5) The 2nd defendant was not in charge of day-to-day operations of the plaintiff and had no knowledge as to how much there was in the bank as he did not have sight of the contents of the bank statements. As the plaintiff's own directors and employees had full knowledge of its own financial status then blame could be attributed to the 2nd defendant for breaching a fiduciary duty when there was no such duty in the first place. C
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- (6) The tenancy had been legitimately terminated and with the order to stop all activities on the piece of land, the plaintiff would not be able to enjoy any goodwill arising from its business on the piece of land. (para 47) E

[Order accordingly.]

Case(s) referred to:

- Chua Boon Chin v. JM McCormack & Ors* [1979] 2 MLJ 156 (*refd*) F
- Dr Harjit Singh v. Suhaimi Samat & Anor* [1995] 2 AMR 1988 (*refd*)
- Er Eng Hong & Anor v. New Kim Eng Dan Tiap-Tiap Pemegang Yang Menduduki Atas Sebahagian Tanah Yang Dikenali Sebagai HS (M) 2162 PTD 4403 Mukim Benut, Daerah Pontian* [2000] 1 CLJ 289 HC (*refd*) G
- Livingstone v. Rawyards Coal Co* [1880] 5 App Cas 25 (*refd*)
- Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC (*refd*)
- Nur-Islam Worldwide Industries Sdn Bhd v. Yee Kok Sum* [2001] 7 CLJ 494 HC (*refd*) H
- Rookes v. Barnard* [1964] 1 All ER 367 (*refd*)
- SME Aerospace Sdn Bhd v. Steyr Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121 HC (*refd*)
- Sime Engineering Sdn Bhd & Anor v. Public Bank Bhd* [2004] 5 CLJ 561 HC (*refd*) I

- A Legislation referred to:**
Bills of Exchange Act 1949, ss. 55(1)(a), 74(b)
Contracts Act 1950, ss. 24, 33, 57(2)
National Land Code, s. 235
Specific Relief Act 1950, ss. 7(1), (2), (3), 8(1), (2)
- B Other source(s) referred to:**
Judith Sihombing, *The National Land Code, A Commentary*, para 3454
McGregor on Damages, 14th edn, p 7
Norchaya Talib, *Law of Torts in Malaysia*, 2nd edn, p 417
- C** *For the plaintiff - V Vijaya Segaran; M/s Maxwell, Kenion, Cowdy & Jones*
For the 1st defendant - Dato V Sithambaram; M/s Kumar & Co
For the 2nd defendant - Chan Kok Keong (Norazali Nordin with him);
M/s Chan & Assoc
- Reported by Suhainah Wahiduddin*
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JUDGMENT

James Foong JCA:

E Introduction

- [1]** The 1st defendant, a family owned company, is the owner of a piece of land of approximately 7 acres and held under H.S. (D) KA 81943 for lot PT 162011 in the Mukim of Hulu Kinta, Perak (the said land). It is strategically located in Ipoh where there is a hyper market known as Jaya Jusco right opposite. The 2nd defendant is a director of the 1st defendant who was authorized to deal with the said land. On 16 November 2000, the 2nd defendant issued a letter for and on behalf of the 1st defendant to one Lee Soon Tuan, a promoter of a company to be incorporated, agreeing to let the said land for an entertainment outlet. It was agreed that this arrangement was to be formalized by a written tenancy agreement between the company to be incorporated and the 1st defendant, and pending the execution of this written tenancy agreement, the tenant was allowed to take possession of the said land provided that the tenant shall apply “to the relevant authorities for the necessary licences for the operation of the entertainment outlet and the erection of structures”. The plaintiff was subsequently recognized by the 1st defendant as the tenant of the said land. Soon after this letter of 16 November 2000, Lee Soon Tuan wasted no time in securing

the relevant licences to operate the entertainment outlet. This included an application to the District Office for permission to operate a public house and to sell liquor therein, an application to the Customs Department for permission to provide taxable services and, application to Majlis Bandaraya Ipoh (MBI) to operate restaurants and cafes on the said land. The last is commonly known as the “business licence”. From evidence adduced, all such licences were secured except for the last which had conditions attached. MBI’s letter dated 15 January 2001 stated it in this manner:

Pemohonan Untuk Kelulusan Pelan Pembangunan Restoran Dan Kafe Di Atas Plot 162011, Jalan Teh Lean Swee, 30350 Ipoh, Perak Darul Ridzuan

Adalah saya dengan segala hormatnya merujuk surat tuan bertarikh 07 Disember 2000 mengenai perkara di atas dan dimaklumkan bahawa Jawatankuasa yang bermesyuarat pada 21 Disember 2000 pada dasarnya telah meluluskan cadangan tersebut tertakluk kepada mematuhi syarat-syarat berikut:

- i. Mengemukakan semula pelan pembangunan dan kertas konsep projek berkenaan kepada Majlis Bandaraya Ipoh sebelum memulakan pembangunan;
- ii. Menjelaskan yuran pelan sebanyak 20 kali ganda mengikut Akta Jalan, Parit dan Bangunan (Undang-Undang Kecil Bangunan Seragam) kerana telah memulakan pembangunan tanpa mendapat kelulusan pelan terlebih dahulu;
- iii. Mematuhi syarat-syarat Perlesenan, Jabatan Kesihatan, Majlis Bandaraya Ipoh;
- iv. Menyediakan “Buffer” dengan skim perumahan bersebelahan;
- v. Jalan keluar – masuk hendaklah melalui Jalan Teh Lean Swee dan tidak ke Jalan Chan Chee Keong;
- vi. Posisi tanda hendaklah mengikut nasihat Majlis.

2. Bersama-sama ini dikembalikan sejumlah 10 salinan pelan susunatur untuk dibuat pindaan untuk tindakan pihak tuan selanjutnya ...

(Azizuddin bin Haji Alias, AMP., PPT., APPM.)
Pengarah Perancang Bandaraya)
bp. Datuk Bandar Ipoh

A [2] Aside from applying for these licences, the plaintiff also proceeded to construct structures on the said land. Once these were completed, the plaintiff began to operate the entertainment outlet thereon.

B [3] Having an interest in this plaintiff's venture, the 2nd defendant invested a sum of RM100,000 in the plaintiff. But shares in the plaintiff were not issued to him. Instead, he was made a director together with Lee Soon Tuan and one Lee Gim Aik, who were the principal shareholders of the plaintiff. Though
C the 2nd defendant was one of the three directors of the plaintiff, he was made a compulsory signatory of all cheques and banking documents of the plaintiff.

D [4] On 5 February 2001, a formal written tenancy agreement for the said land was entered into between the 1st defendant and the plaintiff. It was for a period of three years commencing from 15 December 2000 with a monthly rental "to be determined by the number of sub-tenants the tenant has on the said land subject to a maximum sum of Ringgit Malaysia Twenty One Thousand
E (RM21,000) per month (hereinafter referred to as "the maximum rent"). The initial rental whether or not there are sub-tenants shall be Ringgit Malaysia Three Thousand Five Hundred (RM3,500) per month (hereinafter referred to as "the initial rent") and shall be payable monthly in advance on the 15th day of each and every
F succeeding month. The rental shall be increased by a sum of Ringgit Malaysia Three Thousand Five Hundred (RM3,500) each time the tenant obtains a sub-tenant until the maximum rent is achieved".

G [5] Under cl. 5.1 of the agreement, the "tenant shall duly and punctually pay the monthly rental, utilities and other charges (if any) payable under this agreement ..."

H [6] And under cl. 5.5 of the agreement the plaintiff covenanted that the "tenant shall comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the said land and the erection of structures and shall comply with all requirements which may be given by any authority having jurisdiction or authority over or in respect of the said land ...".

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[7] Then under cl. 5.9 of the agreement it is stipulated that the “tenant shall not use the said land for any unlawful purpose and shall not do or permit to be done any act or thing which may become a nuisance or give reasonable cause for complaint from building/portion adjoining the said land”.

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[8] And in the event of default or breach of these conditions, cl. 7 of the agreement provides:

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Default And Termination

7.1 The Landlord and the Tenant hereby agree that:

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(a) if the monthly rental hereby reserved or any part thereof shall remain unpaid for a period of fourteen (14) days after the same shall have become due and payable in accordance with the covenants for payment herein contained; or

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(b) if the Tenant commits, permits or suffers to occur any breach or default in the due and punctual observance and performance of any of the covenants, obligations and provisions of this Agreement after the Landlord has given fourteen (14) days notice in writing to the Tenant to rectify such breach or default; or ...

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Then in any one or more of such events, the Landlord shall at any time thereafter be entitled to terminate this Agreement by notice in writing to the Tenant and forfeit the Security Deposit paid hereunder but without prejudice to any action or other remedy which the Landlord has or might or otherwise could have for the recovery of damages or arrears ...

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7.3 In the event that the Tenant continues to remain in occupation of the Said Land and fails to surrender or yield up unto the Landlord the whole of the Said Land and every part thereof or fails to remove all its goods from the Said Land after the termination of the Tenancy, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the rental payable prior to the termination for the period between the date of termination and the date of actual delivery of vacant possession PROVIDED ALWAYS THAT if the termination occurs in the first year of the Tenancy but the Tenant holds over to the second year of the Tenancy, the Tenant shall pay to the Landlord double the Maximum Rent from the second year onwards until the date of actual delivery of vacant possession. Further, the Landlord shall be

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- A entitled to re-possess the Said Land *vide* court proceedings under Section 7(2) of the Specific Relief Act 1950. All cost and expenses incurred by the Landlord in bringing an action for repossession shall be borne by the Tenant, and the Landlord may recover the same from the Tenant forthwith.
- B [9] Arising from this tenancy, the following sums of monies were paid by the plaintiff to the 1st defendant:
- C (a) RM21,000 as security deposit;
- C (b) RM7,000 for rentals for the month of December 2000 and January 2001.
- D [10] On 28 February 2001, a plaintiff's cheque signed by the 2nd defendant and one other director of the plaintiff for a sum of RM3,500 was presented to the 1st defendant for payment of rental for the month of February 2001. Accepting this rental for and on behalf of the 1st defendant was the 2nd defendant. But this cheque was not presented by the 1st defendant to the plaintiff's bank for payment until 17 March 2001. By which time there were insufficient funds in the plaintiff's account to meet this
- E payment resulting in this cheque being dishonoured. Using this as the reason for non-payment of the monthly rental to the said land, the 1st defendant, through its solicitors Ms Chan & Associates, by letter dated 19 March 2001 to the plaintiff terminated the
- F tenancy agreement. They declared that by virtue of "cl. 7.1(a) of the aforesaid agreement, our client is entitled to terminate the tenancy agreement if the monthly rental or any part thereof shall remain unpaid by your good selves for a period of 14 days after the same shall have become due and payable to our client, ie, by 1 March 2001".
- G [11] Upon receipt of this letter, the plaintiff's employee immediately proceeded to the 1st defendant's office to tender a sum of RM3,500. But the 1st defendant refused to accept it. On the very next day, 28 March 2001, the plaintiff made another
- H attempt to pay the rent. This time, through its solicitors. But this was again rejected by the 1st defendant who insisted that the tenancy to the said land has been terminated.
- I [12] On 28 March 2001, the 1st defendant sealed off the said land and posted security guard there to prevent the plaintiff, its servants and/or its agents from entering. Then on 16 March 2001 and 17 March 2001, the 1st defendant tore down and flattened all structures on the said land with cranes and bulldozers.

[13] As a result of this, the plaintiff brought this action against the 1st defendant for breach of contract and trespass, and against the 2nd defendant for breach of fiduciary duty as a director of the plaintiff and for inducing the 1st defendant to breach its tenancy agreement with the plaintiff.

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Claims Of The Plaintiff Against The Defendants

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[14] Against the 1st defendant, the plaintiff prays for:

1. a declaration that the tenancy agreement was wrongfully terminated by the 1st defendant;
2. a declaration that the 1st defendant had wrongfully and unlawfully taken possession of the said land;
3. a declaration that the plaintiff is entitled to a lease or tenancy of the said land for the remaining period of the tenancy with option to renew for another two years as is deemed appropriate from the date of re-possession by the 1st defendant;
4. an injunction to restrain the 1st defendant and or its agents and or servants from selling, disposing, charging, leasing, parting with possession of the said land pending the outcome of this suit;
5. cost and expenses involved in the reinstatement of the structures and buildings (together with contents) to its original state and condition or alternatively a sum of RM1,219,600 as special damages or such sum as deemed appropriate by the court;
6. loss of profit from potential sub-tenants and income from billboards advertising at RM150,000 per month or such sum as deemed appropriate for the remaining period of the tenancy and its renewal calculated from the time when the 1st defendant re-possessioned the said land;
7. general damages for wrongful eviction and trespass;
8. loss of profit at RM1,320,000 per year or such sum as the court deems fit to grant;
9. loss of goodwill of the business estimated at RM500,000;
10. exemplary and or aggravated damages;
11. costs.

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- A [15] Against the 2nd defendant, the plaintiff prays for:
1. general damages, exemplary and/or aggravated damages and costs.

B **Defence & Counterclaim Of The 1st Defendant**

[16] The defences as pleaded by the 1st defendant are *inter alia*:

1. the plaintiff was in breach of the tenancy agreement by failing to pay rent to the said land within the stipulated time;
- C 2. the plaintiff had failed to comply with laws and by-laws and the conditions imposed by MBI;
3. the plaintiff had committed public nuisance by causing noise pollution to adjoining land owners;
- D 4. the 1st defendant was entitled to repossess the said land as landowner and to demolish illegal structures thereon; and
5. that s. 7(2) of the Specific Relief Act has no application to this claim of the plaintiff “as building structure on the said land has been erected without proper planning permission and further the business licences had been revoked”;
- E 6. that the “illegal structure erected on the said land (are) without approved building plans from Majlis Perbandaran Ipoh exposed the 1st defendant to various offences and penalties as herein before stated that entitled the 1st defendant to re-take possession and restore the said land to its original condition”.
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- G [17] Beside this defence, the 1st defendant counterclaimed the plaintiff for a sum of RM34,700 as special damages incurred for disconnecting electricity supply to the said land, demolition of the structures and filling up holes dug up for ponds thereon. Without really specifying the cause of action against the plaintiff in its counterclaim, the 1st defendant also prayed for general damages.

H **Defence Of 2nd Defendant**

- I [18] The defences of the 2nd defendant are basically these: that he was not the person in control of the financial, management and operational affairs of the plaintiff and thus owed no fiduciary duty to the plaintiff and neither did he induce the 1st defendant to breach its tenancy contract with the plaintiff.

Issues

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[19] Arising from this set of facts, claims, defences and counterclaims, I am of the view that the issues of this case are as follow:

1. Was the 1st defendant in breach of the tenancy agreement by terminating the tenancy of the plaintiff to the said land?

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2. If the answer to the first issue is in the positive, was the 1st defendant entitled to evict the plaintiff forcefully and demolish all structures on the said land?

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3. If the answer to issue 1 is in the negative and to issue 2 is in the positive, then is the plaintiff entitled to the reliefs sought against the 1st defendant?

4. Did the 2nd defendant induce the 1st defendant to breach the tenancy agreement?

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5. Was there a fiduciary duty owed by the 2nd defendant to the plaintiff and if there was, did the 2nd defendant breach this duty?

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6. If the answer to either issues 4 and 5 above is in the positive, would the plaintiff be entitled to the reliefs sought?

7. Is the 1st defendant entitled to counterclaim the plaintiff?

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Analysis

1st Issue: Was The 1st Defendant In Breach Of The Tenancy Agreement By Terminating The Tenancy Of The Plaintiff?

[20] At the outset, I must stress that the letter of termination by the 1st defendant's solicitors to the plaintiff on 19 March 2001 gave only one reason for the termination: that the monthly rental remained unpaid for 14 days after due date. So the starting point of my analysis is to determine whether this is true.

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[21] It is common ground that the cheque for payment of February 2001 rental was issued and handed over to the 2nd defendant for onward transmission to the 1st defendant on 28 February 2001. At that point of time, rental for the month of February 2001 was already due since it had to be paid by the 15th day of each month. However, despite this delay, the 1st

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- A defendant accepted it. But when the cheque for this payment was dishonoured on 17 March 2001, rental for the month of February 2001 was already outstanding for more than 14 days (from due date 15 February 2001). So under cl. 7.1(a) of the tenancy agreement, the 1st defendant was legally entitled to terminate the
- B tenancy agreement by notice in writing. By this deduction, I hold that the 1st defendant was within its legal right to terminate the plaintiff's tenancy.

- C [22] But what the plaintiff is arguing is that at the time when the cheque for February 2001's rental was tendered to the 1st defendant on 28 February 2001, there were sufficient funds in the plaintiff's bank account to honour it. Instead, the 1st defendant intentionally delayed in banking in this cheque until such funds were depleted. By such action, the plaintiff could not be
- D considered as having defaulted in paying the February 2001's rental.

- E [23] In my opinion, this form of reasoning is totally untenable. The main question here is whether rental remained unpaid for a period of 14 days. The answer is definitely in the positive as can be gathered from the facts. Though the purported payment of rental was carried out on 28 February 2001, which was just before the 14 day grace period prior to the landlord's right to terminate the tenancy by virtue of cl. 7.1(a) of the tenancy agreement, it was not made good by the dishonoured cheque. The
- F law requires the drawer of a cheque to honour his cheque (see s. 55(1)(a) of the Bills of Exchange Act 1949) and this implies that he should have sufficient funds in his bank account to do so. It is useless for a drawer of a cheque to claim that he had funds in his bank account at the time when he issued the cheque but
- G not when it was presented for payment. Such reasoning, I find does not hold in law. A holder of a cheque has every right to present it for payment within reasonable time and expects it to be honoured. What is reasonable time depends on the facts of the case – see s. 74(b) of the Bills of Exchange Act 1949. In our
- H situation, the plaintiff's cheque was presented by the 1st defendant for payment about 15 days after it was drawn and tendered. This cheque was handed over to the 1st defendant's staff by the 2nd defendant. The 1st defendant did not only own this said land nor depended on the rental there from as the only
- I source of income. They were landed proprietors as well as being

engaged in other form of business. So as they have explained, time was required to record daily takings from their businesses before such payments were presented to the various banks for payment. Considering such necessary administrative duties in the light and scope of the 1st defendant's business that were required to be carried out, I am of the view that the time taken by the 1st defendant in presenting the plaintiff's cheque for payment is not unreasonable. It is also my view that instead of blaming the 1st defendant for the delay in presenting the said cheque for payment, the plaintiff should have been more vigilant in monitoring its banking account to ensure that there were sufficient funds to meet payment of this cheque. Attributing this shortcoming to the 2nd defendant who was said to have managed the financial affairs of the plaintiff is a separate matter altogether which I shall be dealing with later. But as far as the 1st defendant is concerned, since there was no payment of rental within the time stipulated in the tenancy agreement, the 1st defendant had a legitimate right to terminate the plaintiff's tenancy under cl. 7.1 of the tenancy agreement.

[24] The 1st defendant has also accused the plaintiff for being in breach of cl. 5.5 of the tenancy agreement in failing to comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the said land. Essentially this complaint centers on the plaintiff's non compliance of the conditions set down by MBI for the issuance of the business licence. But having examined the evidence in detail, I cannot say that the plaintiff was in breach of this clause. MBI had in fact by its letter of 15 February 2001, "telah meluluskan cadangan tersebut (of the plaintiff for the business licence) tertakluk kepada mematuhi syarat syarat berikut ..." Though structures were erected on the said land prior to MBI's approval, nevertheless MBI seemed to have allowed these to remain and be utilized. This can be detected from one of the conditions set down by MBI in the above mentioned letter which says: "Menjelaskan yuran pelan sebanyak 20 kali ganda mengikut Akta Jalan, Parit dan Bangunan (Undang-Undang Kecil Bangunan Seragam) kerana telah memulakan pembangunan tanpa mendapat kelulusan pelan terlebih dahulu". If MBI had considered its regulations and rules to have been breached by the presence of these buildings in the absence of their approval, I would have expected them to immediately issue a demolition order for these rather than allow them to remain

- A standing and be used. And this went on until 22 February 2001 when MBI requested that the plaintiff stop all its activities on the said land until the conditions imposed were complied with. But even then and up to 23 March 2001, the plaintiff's application for the business licence had not been rejected. All that MBI said in
- B their letter of 23 March 2001 was that MBI's committee in charge of this matter had deferred the approval until the stated conditions were met. I agree with the plaintiff's explanation that it was the 1st defendant who prematurely prevented the plaintiff from fulfilling the conditions imposed by MBI by terminating the plaintiff's
- C tenancy. But nevertheless even though the 1st defendant failed on this ground the termination of the plaintiff's tenancy is still lawful by reason that rent for the month of February 2001 was not paid within the stipulated time.
- D [25] The last ground raised by the 1st defendant to support its claim that the plaintiff has breached the tenancy agreement is that the plaintiff committed nuisance by causing noise pollution to nearby residents of the said land. I am afraid that except for a reminder by MBI in a letter to the plaintiff dated 15 February
- E 2001 which referred to a complaint by nearby residents of high noise level there is no other evidence advanced by the 1st defendant during trial to positively prove that the plaintiff had actually "used the said land for any unlawful purpose and shall not do or permit to be done any act or thing which may become a
- F nuisance or give reasonable cause for complaint from building/portion adjoining the said land" – taken from cl. 5.9 of the tenancy agreement. To succeed in this allegation, it is my view that the 1st defendant must first prove that the plaintiff had used the said land for an unlawful purpose. So the act or thing that
- G gives rise to nuisance must be accompanied by the use of the said land for unlawful purpose. But here, I find no evidence that the plaintiff had used the said land for any unlawful purpose. The plaintiff had secured from the police licence to operate the said land as an entertainment centre, from the District Office permission
- H to sell liquor and drinks, and from the Customs Department approval to provide taxable services. And even for the business licence, MBI had given their tacit approval, a matter which I elaborated earlier. I therefore find that this allegation of the 1st defendant unsustainable. In any event, this was not the ground
- I given by the 1st defendant for terminating the tenancy agreement. This brings me to form the view that this assertion of nuisance was an afterthought.

[26] Before I conclude on this issue, I would like to touch on the claim by the plaintiff that the 1st defendant has also breached s. 235 National Land Code (NLC) by not giving the plaintiff sufficient notice to remedy the breach. Section 235 reads:

Notice before forfeiture

Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture of any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing:

- (a) specifying the particular breach complained of;
- (b) if the breach is capable of remedy, requiring him to remedy it, and
- (c) in any case other than non-payment of rent requiring him to make compensation in money for the breach,

and the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefore to the satisfaction of that person or body.

[27] Without the necessity to dwell in the details of this with the facts of the case, all that I need to say is that I agree with the submission of the 1st defendant that this provision only applies to registered tenancy under the NLC. My view is supported by a commentary of Judith Sihombing in her celebrated book on *'The National Land Code, A Commentary'* where at para. 3454 she said:

This section applies to registered leases (section 221), registered subleases (section 222), and tenancies exempt from registration which have been endorsed on title (sections 213 and 316). The right to forfeit an unregistered lease depends on the existence of an express proviso for re-entry in the lease. This proviso should be expressed to be exercisable in the same circumstances as are contained in section 234: *Re Karuppiah* [1962] MLJ 389.

[28] So on the first issue, my answer is in the positive.

- A *2nd Issue: Was The 1st Defendant Entitled To Evict The Plaintiff Forcefully And Demolish All Structure On The Said Premises?*

[29] Now that I have held that the tenancy has been legitimately terminated by the 1st defendant under cl. 7.1(a) of the tenancy agreement, the next issue that has to be dealt with is whether the 1st defendant was entitled to evict the plaintiff forcefully and demolish all structures on the said land. To consider this, it is necessary for me to repeat cl. 7.3 of the tenancy agreement which says:

- C In the event that the Tenant continues to remain in occupation of the Said Land and fails to surrender or yield up unto the Landlord the whole of the Said Land and every part thereof or fails to remove all its goods from the Said Land after the termination of the Tenancy, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the rental payable prior to the termination for the period between the date of termination and the date of actual delivery of vacant possession PROVIDED ALWAYS THAT if the termination occurs in the first year of the Tenancy but the Tenant holds over to the second year of the Tenancy, the Tenant shall pay to the Landlord double the Maximum Rent from the second year onwards until the date of actual delivery of vacant possession. Further, the Landlord shall be entitled to re-possess the Said Land *vide* court proceedings under Section 7(2) of the Specific Relief Act 1950. All cost and expenses incurred by the Landlord in bringing an action for repossession shall be borne by the Tenant, and the Landlord may recover the same from the Tenant forthwith.
- D
- E
- F

[30] And s. 7(2) of the Specific Relief Act demands:

Recovery of specific immovable property

- G Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.
- H

[31] Then in s. 7(3) of the same Act it says:

- I In subsection (2) “occupier” means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

[32] There are numerous authorities (*Nur-Islam Wordwide Industries Sdn Bhd v. Yee Kok Sum* [2001] 7 CLJ 494; *Dr. Harjit Singh v. Suhaimi bin Samat & Anor* [1995] 2 AMR 1988; *Er Eng Hong & Anor v. New Kim Eng Dan Tiap-Tiap Pemegang Yang Menduduki Atas Sebahagian Tanah Yang Dikenali Sebagai HS (M) 2162 PTD 4403 Mukim Benut, Daerah Pontian* [2000] 1 CLJ 289; *SME Aerospace Sdn Bhd v. Steyr Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121) to say that failure to comply with this mandatory requirement of s. 7(2) of the Specific Relief Act will subject the landlord to reinstate and to compensate the tenant to its original position before the unlawful eviction. Realizing this shortcoming, the 1st defendant strenuously offered the following reasons to get around s. 7(2) Specific Relief Act:

1. Section 7(2) of the Specific Relief Act is not applicable to a tenancy agreement which is void. In this case, the tenancy agreement is void because two conditions precedent were not fulfilled. They were: (a) the approval for the construction of the structures on the said land and; (b) the approval for the business licence to be secured by the plaintiff prior to the commencement of the tenancy. When the tenancy agreement is a contingent agreement dependent on compliance of pre-conditions and these pre-conditions were not fulfilled, then the agreement is void under s. 33 of the Contracts Act.
2. The tenancy agreement is also void under s. 24 of the Contracts Act since the objective of the tenancy was unlawful – unlawful in the sense that the plaintiff was occupying the illegal structures on the said land and conducting its activities therein without licence.
3. By not being able to secure the approval from MBI for the structures constructed on the said land and the business licence, the act required to be done under the tenancy agreement became impossible to perform. When an agreement to do an act becomes impossible in itself the agreement is void under s. 57(2) Contracts Act.

[33] I think all these arguments of the 1st defendant are without substance. Firstly, to say that the tenancy agreement is a contingent contract is incomprehensible. A perusal of the tenancy agreement will bear this out. By no stretch of imagination could this tenancy agreement ever be construed as a contingent contract dependent upon certain events to take place. To me, it

- A was simply a tenancy agreement to let out the said land for a period of time for a consideration. In order to use the said land as a tenant, the plaintiff had in the agreement declared certain covenants to the 1st defendant as landlord. And the purported conditions precedents, in my view, are actually covenants. These
- B covenants cannot be translated into conditions precedent. They remain as covenants. The tenancy agreement is not dependent on these covenants to exist nor did it depend on any of the events alleged by the 1st defendant to be conditions precedent. And if the plaintiff had breached any of the stipulated covenants, the 1st
- C defendant, as landlord, is entitled under the terms of the tenancy agreement to seek remedy against the plaintiff, such as terminating the tenancy agreement. But this does not make the tenancy agreement void.
- D [34] The second ground proffered by the 1st defendant is even more absurd. It makes no logical sense. I could not detect any unlawful objective in this tenancy agreement. As stated, essentially this tenancy agreement is one of tenancy where the 1st defendant, as landlord, agrees to let to the plaintiff, as tenant, the said land
- E for a certain period at an agreed rent. There is nothing sinister about this.
- F [35] The third argument of the 1st defendant is again without merit when the objective of the tenancy remains essentially that of letting the said land to the plaintiff for a term at an agreed consideration. This objective did not become impossible or unlawful to carry out after the tenancy agreement came into existence. To secure the relevant approval for the structures constructed and to use the structures for an intended purpose are not the primary objectives of the contract; the renting of the said land is.
- G [36] As often repeated, s. 7(2) and (3) of the Specific Relief Act has regulated the remedy of self help into oblivion as the owner of the said land can only seek to enforce his right to recover his property from the occupier, even after the tenancy has terminated,
- H by way of a court action. As the 1st defendant in this case had not adopted this approach but instead enforced its rights by self help, my answer to the 2nd issue is in the negative.

I

*3rd Issue: Should The Plaintiff Be Entitled To The Reliefs Sought
Against The 1st Defendant* A

[37] Based on my analysis of the 1st and 2nd issues, it is obvious
that the plaintiff's claim against the 1st defendant is based on the
cause of action of trespass on the said land by non-compliance of
s. 7(2) of the Specific Relief Act. Its claim for breach of contract
is rejected. With this firmly in mind, I shall now proceed to deal
with the reliefs claimed by the plaintiff against the 1st defendant. B

[38] The 3rd prayer in the statement of claim is for a declaration
that the plaintiff be entitled to a lease or tenancy of the said land
for the remaining period of the tenancy with the option to renew
from date of re-possession by the 1st defendant. But there is no
specific demand for restoration of possession to the said land due
to unlawful eviction by the 1st defendant. This 3rd prayer only
requests for a declaration that the tenancy to the said land still
exists for the remaining period and that possession be allowed on
this basis. Since I have held that the tenancy was lawfully
terminated, possession to the said land based on the existence of
a valid tenancy cannot be possible. Possession can only be granted
to the plaintiff for unlawful eviction by the 1st defendant for failing
to comply with s. 7(1) Specific Relief Act. It is allowed by virtue
of s. 8(1) and (2) Specific Relief Act which says: C
D
E

8 (1) If any person is dispossessed without his consent of
immovable property otherwise than in due course of law, he or
any person claiming through him may, by suit, recover possession
thereof, notwithstanding any other title that may be set up in the
suit.. F

(2) Nothing in this section shall bar any person from suing to
establish his title to any such property and to recover possession
thereof. G

[39] But the plaintiff did not seek redress for possession of the
said land under this provision of the law. So when there is no
claim for possession of the land through this means, what is left
in the plaintiff's claim is only for damages for trespass. H

[40] Since trespass is actionable *per se*, it is not necessary for the
plaintiff to prove actual loss in order to recover damages from the
1st defendant. However, if actual loss is suffered and proved then
the plaintiff should be duly compensated. And this should be for
a "sum of money which will put the party who has been injured, I

A or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation” – *McGregor on Damages* 14th edn p. 7 citing Lord Blackburn in *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas 25. For this, the plaintiff has made the following claims:

- B 1. Cost and expenses involved in the reinstatement of the structures to its original state and condition amounting to a sum of RM1,219,600.
- C 2. Loss of profit from potential sub-tenants and income from billboard advertising at RM150,000 per month commencing from the date of being dispossessed of the said land till an appropriate date.
- D 3. Loss of net profit in the sum of RM110,000 per month from 28 March 2001 until 15 December 2005 or until 15 December 2003 or such other date as deemed appropriate.
4. Loss of goodwill of business estimated at RM500,000.
- E 5. Exemplary and aggravated damages.

[41] I shall deal with each of these in turn.

Cost Of Reinstatement

- F [42] For cost of reinstatement of the structure which is listed as RM1,219,600, I only allow the following which were proved:
1. RM330,000 for the cost of construction of the structure.
- G 2. RM106,206 as contribution to the TNB substation. I disallow the claim for RM20,000 which was deposited by the plaintiff with Maybank Bhd which in turn issued a guarantee to TNB. My reason is that this deposit with Maybank can be recovered by the plaintiff from the bank directly.
- H 3. RM53,049.04 for road works and car parking facilities.
4. RM28,491.50 for landscape works.
5. RM9,875 for construction of pond.
- I 6. RM11,011 for construction of Lily Stock (attap roof).

7. RM43,364 for sound system, disco lights, TV monitors and speakers. A
 8. RM52,202.80 for air curtains and air-conditioners.
 9. RM10,000 for office equipment. B
 10. RM70,001 for free standing structure and canopy and steel frame.
 11. RM140,000 for engineering works.
 12. RM11,700 for signboards, advertising, uniform and printing costs. C
 13. RM8,800 for cash register.
 14. RM20,000 for extra construction works. D
 15. RM14,000 motor for the pond.
 16. RM9,000 for insurance premium.
 17. RM2,248.50 for consultation fee. E
 18. RM9,280 for plumbing.
 19. RM10,000 for display items.
 20. RM5,000 for glassware. F
- [43] I disallow a claim of RM100,000 for miscellaneous items since there is no actual proof of such loss.
- [44] The total amount as allowed under this head is RM944,228.84. G
- Loss Of Profit From Potential Sub-tenants And Income From Billboard Advertising At RM150,000 Per Month Commencing From The Date Of Being Dispossessed Of The Said Land Until A Date Deemed Appropriate***
- [45] I disallow this claim for two reasons. First, the plaintiff's tenancy has been legitimately terminated and it would be unlawful for the plaintiff to proceed to secure sub-tenants and to solicit billboard advertising on the said land. Secondly, there is no evidence to prove that this is the expected amount from this source of income. H
I

A ***Loss Of Net Profit In The Sum Of RM110,000 Per Month From 28 March 2001 Until 15 December 2005 Or Until 15 December 2003 Or Such Other Date As Deemed Appropriate***

B [46] I refuse this claim for reason that the tenancy to the said land has been legitimately terminated. When it is terminated, the plaintiff should not be continuing with its business. Further, MBI has also issued an order to the plaintiff to stop all activities on the said land following which the plaintiff would not be able to
C enjoy the expected income arising from the sort of activity.

Loss Of Goodwill Of Business Estimated At RM500,000

[47] I refuse to entertain this claim for the same reason as stated: with the tenancy legitimately terminated and with the order to
D stop all activities on the said land, the plaintiff would not be able to enjoy any goodwill arising from the stated nature of business on the said land. Further, the period of operation on the said land by the plaintiff was relatively short to have generated any goodwill.

E ***Exemplary And Aggravated Damages***

[48] To succeed in this claim for exemplary and aggravated damages, there must be evidence to show that the 1st defendant's conduct had been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff – *Rookes*
F *v. Barnard* [1964] 1 All ER 367, or that the 1st defendant was motivated by malice, insolence or arrogance or calculated to make a profit at the expense of the plaintiff – *Sime Engineering Sdn Bhd & Anor v. Public Bank Bhd* [2004] 5 CLJ 561 at p. 567.

G [49] I detected none of these elements in the actions of the 1st defendant. I do not believe and neither is there any direct evidence adduced by the plaintiff to prove that the 1st defendant's unlawful and drastic action of tearing down and flattening the structures on the said land without first obtaining a court order
H to do so was motivated by profit at the expense of the plaintiff, or insolence or arrogance. It was more out of fear and impatience. Indeed, the said land was leased out to a 3rd party subsequently but this, in my view, arose out of the ordinary course of business after the plaintiff had been evicted from the land. I found no
I evidence to suggest that this was planned by the 1st defendant prior to eviction.

Conclusion

A

[50] For the 3rd issue, I award a sum of RM944,228.84 to the plaintiff as damages for trespass.

4th Issue: Did The 2nd Defendant Induce The 1st Defendant To Breach The Tenancy Agreement?

B

[51] From the pleadings, the plaintiff's allegation against the 2nd defendant under the cause of action for inducement of breach of contract is based on the conduct of the 2nd defendant in first issuing the cheque of RM3,500 for payment of February 2001's rental and then inducing the 1st defendant to delay in presenting it for payment which resulted in the tenancy agreement being terminated.

C

[52] To succeed in an action for inducement of breach of contract, the plaintiff must prove that the 1st defendant, as a third party to the tenancy agreement, had deliberately interfered in the execution of the agreement which had been concluded between the plaintiff and the 1st defendant – *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor.* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211. Thus the following conditions must be satisfied:

D

1. there must be direct or indirect interference with the use of unlawful means; and
2. the plaintiff must show that the 2nd defendant had knowledge of the relevant contract; and
3. the 2nd defendant had the intention to interfere with the contract; and
4. in an action other than *quia timet* injunction, the plaintiff must show that he has suffered special damages which is over and above nominal damage; and
5. so far as it is necessary the plaintiff must successfully rebut any defence based on justification, which the 2nd defendant may put forth

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G

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– see '*Law of Torts in Malaysia*', 2nd edn by Norchaya Talib p. 417.

I

- A [53] Judging from the evidence adduced, I am not inclined to find that the 2nd defendant had directly or indirectly interfered with the use by unlawful means to induce the 1st defendant to breach the tenancy agreement. As I have stated earlier, it is incumbent upon the plaintiff to ensure that there were sufficient funds in its
- B bank account to meet the payment of the said cheque. Although this cheque was not presented immediately after it was drawn and tendered to the 1st defendant it was however done within a reasonable time. Though the 2nd defendant was also a director of the 1st defendant at the material time, nevertheless from the
- C evidence adduced, I could not detect that he had intentionally induced the 1st defendant to delay in banking in the said cheque. As I have said in the earlier part of this judgment, the time taken to present the plaintiff's said cheque was due largely to the administrative work undertaken by the 1st defendant's staff. For
- D these reasons, my answer is in the negative to the question posed in this issue.

5th Issue: Was There A Fiduciary Duty Owed By The 2nd Defendant To The Plaintiff And If There Was, Did The 2nd Defendant Breach This Duty?

- E
- F [54] In the particulars of the statement of claim, the plaintiff alleged that the 2nd defendant, being a director of the plaintiff in charge of finance, owed a fiduciary duty to the plaintiff to ensure that the plaintiff had sufficient funds in its banking account to meet the payment of the plaintiff's cheque for settlement of February 2001's rental. And since the said cheque was dishonoured, the 2nd defendant is in breach of this fiduciary duty to the plaintiff.
- G [55] It is clear that the law imposes a duty on a director of a company to act *bona fide* in the interest of the company in the performance of his functions as a director. He must not place himself in a position where his duty to the company and his personal interest or interest of third party, for whom he acts, may
- H conflict – *Chua Boon Chin v. JM McCormack & Ors.* [1979] 2 MLJ 156 at p. 158.
- I [56] Since the main accusation against the 2nd defendant is that he has knowledge of the plaintiff's bank account and financial health of the company through its bank statements (in so far as these were sent to his office first before being forwarded to the

plaintiff's employee) the 2nd defendant should have alerted and informed the plaintiff that there was insufficient funds to meet the payment of the said cheque instead of allowing it to be dishonoured. Though it is not denied that the 2nd defendant was a compulsory signatory of all cheques drawn by the plaintiff and also that he was the first to receive the plaintiff's bank statements, but the question still remains as to whether he was in fact the man in charge of finance and accounts of the plaintiff.

[57] I shall first start with the claim that the 2nd defendant was a compulsory signatory of the plaintiff's cheques. Being a compulsory signatory means that aside from the signature of either one of the other two directors of the plaintiff, the 2nd defendant must sign on the plaintiff's cheques before they can be honoured. Observing this from the outside, this implies that the 2nd defendant had desired to have a hold or final say on the financial affairs of the plaintiff and therefore would have kept tab of the company's daily cash flow of the company. However, when one examines the circumstances of how this compulsory signature requirement came about coupled with other facts, a different impression arise.

[58] Apparently, when the 2nd defendant together with Lee Soon Tuan went to open the plaintiff's bank account with Maybank, Ipoh it was discovered that both the plaintiff's other directors, Lee Soon Tuan and Lee Gim Aik, were not preferred persons to operate such banking account. They were, in a sort of way, black listed by the banks to operate a current account. So to overcome this, it was proposed by the said bank that the 2nd defendant be a compulsory signatory of the plaintiff's cheques. It was in this light that the plaintiff, who was not even a shareholder of the plaintiff, came to hold this responsibility.

[59] As to the plaintiff's bank statements, the 2nd defendant has admitted that they were indeed sent to his office. But he testified that he did not look at them. Instead, these were immediately handed over to the plaintiff's employee when he or she came to collect them. The 2nd defendant then proceeded to explain that these documents were sent to his address because the plaintiff did not have an office when it first started. Thus, he assisted by providing a mailing address. The latter is indeed correct for when the plaintiff first commenced business in Ipoh, the plaintiff did not

A have an office. As for his assertion that he did not look at the bank statement, this has to be judged against the operational set up of the plaintiff.

B [60] Aside from Lee Soon Tuan and Lee Gim Aik, who were executive directors of the plaintiff, the plaintiff also had a general manager by the name of Bernard Yeo. He was in charge of the day-to-day operations of the plaintiff and this included “making payments to creditors” and “what stock to buy and when to pay”. Bernard Yeo, took instructions from Lee Soon Tuan and Lee Gim Aik, not the 2nd defendant. With Bernard Yeo in charge of what to buy and who to pay and with the bank statements forwarded to his office plus the fact that he reported to the other two directors of the plaintiff, then it is more probable that the person who was in charge of finance with knowledge of how much there was in the kitty was not the 2nd defendant but Bernard Yeo, Lee Soon Tuan and Lee Gim Aik. Similarly, it is also very probable, because of this arrangement, that the 2nd defendant did not have sight of the contents of the bank statements. His office was used primarily as a transit point for the bank statements to pass from the bank to the plaintiff. When the plaintiff’s own directors and employee had full knowledge of its own financial status then blame cannot be attributed to the 2nd defendant for breaching a fiduciary duty when there was no such duty in the first place.

F [61] So my answer to the first part of the 5th issue is in the negative. With this answer, the second part becomes academic and irrelevant.

6th Issue: If The Answer To Either Issue 4 And 5 Is In The Positive, Would The Plaintiff Be Entitled To The Relief Sought?

G [62] Again, since the answers to issue 4 and 5 above are in the negative, this issue is irrelevant.

7th Issue: Is The 1st Defendant Entitled To Counterclaim The Plaintiff?

H [63] I believed that the cause of action of the 1st defendant’s counterclaim is for breach of contract. This is gathered from its pleadings particularly in the claim for special damages which can only arise from a term of the tenancy agreement where the plaintiff has to make good the said land upon termination of the tenancy.

I But was the plaintiff accorded such opportunity to do so? Before anything could be done, the 1st defendant had jumped the gun

and demolished all that was on the said land except, perhaps, the power sub-station. Under such circumstances, I rule that this counterclaim of the 1st defendant cannot be sustained since it is tainted with illegality. Accordingly, it should be dismissed.

Conclusion

[64] For reasons stated above, I hereby

- (a) dismiss prayers 1, 3, 4, (prayer 4 has become academic since events have overtaken this claim) 6, 8, 9, 10 of the plaintiff's claim;
- (b) allow prayer 2;
- (c) award a sum of RM944,228.84 as damages against the 1st defendant with interest thereon at 8% per annum from date of judgment to date of realization;
- (d) costs against the 1st defendant;
- (e) dismiss the plaintiff's claim against the 2nd defendant with costs;
- (f) dismiss the 1st defendant's counterclaim with costs.

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